No. 92-2038

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ASGROW SEED COMPANY,
Petitioner,

v.

DENNY WINTERBOER and BECKY WINTERBOER,
d/b/a DEEBEES,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

Section 2543 of the Plant Variety Protection Act of 1970 ("PVPA" or "Act"), 7 U.S.C. § 2321 *et seq.*, provides that "without regard to the provisions of [Section 2541(3)] it shall not infringe any right hereunder for a person, whose primary farming occupation is the growing of crops for sale for other than reproductive purposes, to sell such saved seed to other persons so engaged, for reproductive purposes . . . ." Section 2541(3) prohibits "sexually multiplying the novel variety as a step in marketing (for growing purposes) the variety." The questions presented are:

1. Whether a unanimous Federal Circuit panel erred in refusing to interpret Section 2543 to limit sales by a farmer to other farmers for reproductive purposes to, in the case of soybeans, 1/45th of the farmer's crop, thus eviscerating the farmer's exemption, in order to accomodate Asgrow Seed Company's perceived purposes of the Act, when the farmer's exemption reflects a compromise between the ancient right of farmers to sell seed to other farmers and the new rights afforded breeders.

2. Whether a unanimous Federal Circuit panel erred in refusing to read into the PVPA the requirement that qualified sales under the farmer's exemption include a notice that the seed is a protected variety, when Section 2543 explicitly provides for an exception from that requirement.

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STATEMENT OF THE CASE

This case raises the question whether a statutory exemption, contrary to its clear language, must be sacrificed in order to serve the asserted general purpose and intent of the statute containing it. Petitioner presumes, without support in the record or analysis, that the breeders' rights created by the Plant Variety Protection Act, 7 U.S.C. § 2321 *et seq.*, will be "destroyed" unless the right of farmers to sell seed for seeding purposes to other farmers, embodied in the farmer's exemption at 7 U.S.C. § 2543, is curtailed to the point of meaninglessness.

Respondents submit that the clear language of the exemption should be honored, and the decision of the Fed-

eral Circuit affirmed. The Federal Circuit's interpretation of the exemption is consistent with the interpretation by the Plant Variety Protection Office shortly after the 1970 promulgation of the Act; with the interpretation widely understood in the farming community as evidenced by numerous articles in the trade press explaining the PVPA; and with the interpretation of the exemption proffered to Congress in 1990 by Amicus the American Seed Trade Association when it asked that the farmer's exemption be narrowed to one crop. Had Congress been unhappy with this interpretation of the exemption, it could have amended the language on numerous occasions, including in 1980 when it made significant changes to other provisions of the PVPA, and in 1990 when it held extensive hearings on the Act.

The unsupported claims and policy arguments of Petitioner regarding the dire consequences attendant if the exemption is not eliminated are not relevant to the Court's task of statutory interpretation. The proper forum for these concerns is Congress, not this Court. The farmer's exemption reflects a political compromise that weighed the centuries-old right of farmers to save seed grown on their farms and dispense with it as they wish against the new rights of breeders in sexually reproducing plants. A review of the PVPA demonstrates that this was not an easy call; the PVPA is the only U.S. statute to convey intellectual property rights in self-reproducing subject matter.[1] Protecting an industry from competition was not undertaken lightly, particularly in the special situation of sexually reproduced plants.

Unlike holders of utility patents, a PVPA certificate holder need not meet the constitutional requirement of "non-obviousness." Indeed, an applicant need not even show its variety is an improvement over existing varieties.

[1] Robert P. Merges, *Intellectual Property in Higher Life Forms: The Patent System and Controversial Technologies*, 47 MD. L. REV. 1051, 1070 (1988).

The absence of any quality requirement in the PVPA registration system has permitted seed companies to "borrow" varieties developed by state research centers, to make functionally insignificant "cosmetic" changes, and, thereby, to obtain so-called "patent-like" protection.[2] When it is considered that farmers, by selective breeding spanning decades, are the source of the cultivars used by the state research centers, and that they often funded public research through special excise taxes, it does not seem inappropriate to grant them limited rights to sell PVPA protected seed grown on their own farm to other farmers.

A. The Alleged Infringement by the Winterboers

This case concerns two varieties of Asgrow soybean seed, designated by it as A1937 and A2234, which, for purposes of the pretrial motion before the District Court, Respondents conceded have received plant variety certificates from the Plant Variety Protection Office of the Department of Agriculture. Asgrow has alleged that the Winterboers infringed their PVPA certificates by 1) unauthorized selling of the two varieties (§ 2541(1)); 2) sexually multiplying the varieties as a step in marketing the varieties (§ 2541(3)); and 3) dispensing the varieties in a form in which they can be propagated without giving notice of their protected status (§ 2541(6)).

Becky and Denny Winterboer are the owners and operators of a small family farm in Clay County, Iowa. The Winterboers grow corn and soybeans. Their primary business is the growing of crops for sale as food and feed—that is, for non-reproductive purposes. (R39). Since 1987, the Winterboers have sold a portion of their seed to other farmers for seeding purposes, a common practice among farmers known as "brown-bagging." (R40). The

[2] Indeed, the Asgrow soybean varieties at issue here, A1937 and A2234, were derived from soybean varieties developed at state research centers. See May 7, 1992 Citation of Supplemental Authorities from William H. Bode to Panel, U.S. Court of Appeals for the Federal Circuit.

gross revenues which the Winterboers received from selling soybeans as seed have always accounted for less than 25% of their total farm income. (R39). In 1988, the income from the sale of seed sold for reproductive purposes was 23.5%, and in 1989, 21.5%, of total farm income. (R39; R43).

The Winterboers have never advertised that they have seed for sale. (R39). They have never utilized brokers, agents, or other third parties to effectuate the sales. (R40). Sales are made from bulk storage on the premises of the farm to people who are known to the Winterboers as farmers in the area, or by word of mouth to other farmers. (R40). In the 1990 crop year at issue in this case, the Winterboers sold less than half of each variety for which Asgrow was issued a certificate of plant protection.[3]

On December 28, 1990, Denny Winterboer received a call from a local farmer, Robert A. Ness, who as it turned out, was acting on behalf of Asgrow. (R40; R17). Although this was two months before the Winterboers' normal soybean seed selling season, and prior to the Winterboers' labels having been prepared, Mr. Ness requested to immediately purchase some bags of soybean. (R40). Mr. Ness did so and gave the purchased bags to Asgrow for testing. (R18).

Thereafter, on January 24, 1991, Asgrow filed a complaint against the Winterboers, seeking damages for alleged infringement of their certificates and a preliminary

[3] Denny Winterboer, at the preliminary injunction hearing, mistakenly testified that a majority of the soybeans grown from the two varieties of Asgrow seeds (as distinguished from the Winterboer's total soybean crop) was sold for reproductive purposes. In fact, the Winterboer's records indicate that of the 12,243 bushels of Asgrow A2234 seed harvested in 1990, 5,855 bushels were sold as seed, while of the 9,812 bushels of Asgrow A1937 seed harvested, 4,530 bushels were sold as seed. Because the appeal to the Federal Circuit was interlocutory, no final factual findings have been made on this issue.

injunction. As the Winterboers later discovered, this suit was part of a concerted campaign by Asgrow against farmers exercising their rights under the PVPA by selling seed to other farmers.[4] Unlike other farmers, however, the Winterboers refused to be intimidated and chose to stand and fight—at great financial and emotional costs.

B. The District Court Proceedings

On March 8, 1991, and March 26, 1991, the District Court conducted evidentiary hearings with respect to plaintiff's motion for preliminary injunction. By the latter date, defendants had completed the sale of all the soybeans in issue. The request for injunctive relief was thus moot for the 1991 growing season, and the parties entered into a stipulated order to that effect. Both sides filed motions for summary judgment on the liability issue in May 1991. After oral argument on July 19, 1991, the court, on September 30, 1991, issued a decision and order granting the plaintiff's motion for summary judgment and issuing a permanent injunction against the defendants' "selling seed in the method commonly referred to as 'brown bagging.'" Pet. App. at 24a.

The district court held that the Winterboers' seed sales to other farmers were not covered by the farmer's exemption. Stating that its primary obligation was to "interpret the statute in a manner which will dictate that the intent of Congress in enacting the PVPA will be accomplished," Pet. App. at 20a, the court held that it was necessary to read into Section 2543 a much more restrictive quantitative limitation on the amount of seed

[4] Asgrow has admitted bringing 18 such suits. At a symposium attended by plant breeders, Asgrow's attorneys offered to sell "litigation kits" to enable others also to sue farmers in order to cause them "headaches" and abandon their rights to sell to other farmers. Dan Kirkpatrick, *Enforcing the Letter of the Law*, SEED WORLD (December 1991); *PVP Rights Should Be Enforced*, SEED INDUSTRY (Aug./Sept. 1991).

that a farmer could save and then sell. The court concluded that Congress intended a farmer to sell only the amount of saved seed the farmer reasonably needed for the upcoming crop. Pet. App. at 21a-22a. "The exemption allows a farmer to save, at a maximum, an amount of seed necessary to plant his soybean acreage for the subsequent crop year." Pet. App. 21a. While acknowledging that it had given a "restrictive reading of the exception," the court stated that such a reading was appropriate because it would further the Congressional objectives of promoting agricultural research and development. Pet. App. at 23a.

In accordance with its analysis of the quantitative limit which was to be read into Section 2543, the court stated that the Winterboers would be enjoined from selling seed, except for saved seed as the court had defined it, to other farmers, and from engaging in any form of "brown bagging." Pet. App. at 24a-25a.

C. The Opinion of the Federal Circuit

Asgrow took an interlocutory appeal to the Federal Circuit. The appellate court rejected the District Court's construction of Section 2543, stating that "[t]he District Court erred in determining that the crop exemption of Section 2543 contains an ensuing crop limitation on the amount of seed a farmer can save." Pet. App. at 10a. The Court noted that the analysis of the District Court—that the phrase "for seeding purposes" modified the verb "save"—overlooked important phraseology within Section 2543. The Federal Circuit observed that "[r]eading the entire passage without critical omissions shows that 'for seeding purposes' modifies the verb 'obtained,' not 'saved.'" Pet. App. at 11a. Thus, the Court concluded, "section 2543 does not contain any explicit limit that a farmer can save and sell only as much seed as necessary to plant an ensuing crop." Pet. App. at 11a. The Federal Circuit correctly apprehended that no other

limitation existed in the first section of Section 2543 regarding the amount of seed that could be saved under the farmer's exemption. As did the Fifth Circuit in *Delta & Pine Land Co. v. Peoples Gin Co.*, 694 F.2d 1012 (5th Cir. 1983), however, the court perceived a number of constraints on sales by farmers under the farmer's exemption. In particular, the Federal Circuit read Section 2543 to contain a number of limitations. These include:

> —a farmer remains subject to infringement under subsections 2541(3) and (4);
>
> —a farmer may only save, use, or sell seed produced from or descended from seed obtained by authority of the PVPA certificate owner for seeding purposes;
>
> —a farmer selling a novel variety must primarily grow crops from that seed for consumption;
>
> —a farmer acquiring a novel variety must primarily grow crops from that seed for consumption;
>
> —a farmer who acquires a novel variety in a brown bag sale can neither save nor sell seed harvested from that seed;
>
> —the sale must comply with state laws; and
>
> —a farmer cannot divert seed originally sold for consumption to planting purposes.

Pet. App. at 9a.

Reading the provisions of Section 2541(3) alongside Section 2543, the Federal Circuit also required that brown bag sales not constitute marketing. The Court defined "marketing" in the context of the PVPA to mean "extensive or coordinated selling activities, such as advertising, using an intervening sales representative, or similar extended merchandising or retail activities." Pet. App. at 12a-13a.

In its Opinion on Denial of Rehearing En Banc, the Court noted further that the terms "selling" and "market-

ing" are both used in Section 2541 in subparagraphs (1) and (3), respectively. This affirms, noted the Court, that in the PVPA "selling is different than marketing," indicating that more concerted activities were contemplated in Section 2541(3). Pet. App. at 29a.

SUMMARY OF ARGUMENT

The unanimous panel of the Federal Circuit correctly parsed the provisions of Section 2543 of the Plant Variety Protection Act. Contrary to Petitioner's argument, there is no limitation on the right of farmers to save seed in the first section of the paragraph. The simple structure of Section 2543 entitles farmers to save seed descended from a protected variety except for the purposes of multiplication as a step in marketing. The farmer then may use the seed to produce a crop on his farm, or sell it for consumption in bona fide channels, or sell it in carefully delimited sales for reproductive purposes. With respect to the last option, Section 2543's second iteration of Section 2541(3)—excepting the farmer from liability for sexual multiplication of protected seed—contemplates sales by qualified farmers in excess of that necessary to replant the crop in the next season.

In contrast to this straightforward interpretation, the Petitioner presses a construction of the farmer's exemption that is contrived and result-driven. Asgrow argues that the reference to Section 2541(3) in Section 2543 means that a farmer who contemplates multiplying the protected variety as a step in marketing (for growing purposes) is limited to selling one crop, or in the case of soybeans, 1/45th of the farmer's harvest. To reach this result, two unstated premises are necessary. First, the term "marketing" must be synonymous with "selling." Second, the farmer's exemption must exclude sales to other farmers for both reproductive and nonreproductive purposes. Rather, these sales are deemed part of a separate "crop exemption" in Section 2543. The Court is

asked to accept this strained reading because, according to the Petitioner, the purposes underlying the statute demand it.

Asgrow's position raises a number of objections, any one of which is fatal by itself. Collectively, they are a serious indictment against Asgrow's litigation campaign against small farmers. These include the following:

- Asgrow's current version of the ensuing crop limitation is a recent relevation of the "proper" meaning of Section 2543; it was not advanced before either the district court or the appellate panel. Moreover, the analysis proffered by Petitioner before the Federal Circuit was different from that used by the District Court. How can a "proper" reading of the farmer's exemption result in so many conflicting interpretations?
- The interpretation of the Federal Circuit was the interpretation given of the farmer's exemption by the Plant Variety Protection Office after promulgation of the PVPA, and by the USDA itself. It is also the interpretation widely understood by the farming industry as evidenced by numerous articles in the trade press.
- Congress, fully aware of the interpretation of the PVPA by the USDA, did not see fit to amend the farmer's exemption in 1980, when substantial amendments were made to other parts of the PVPA. Nor did it in 1990, after the American Seed Trade Association, an Amicus Curiae here, testified that the farmer's exemption was too broad and should be limited to a farmer's ensuing crop.
- Vegetable farmers commonly save enough seed to grow four or five crops. Petitioner's interpretation would severely impact their operation and raise their costs. Moreover, the determination of what constitutes one crop would lead to difficult enforcement problems, as the District Court recognized.

- As a practical matter, "brown baggers" are not in competition with the seed breeders. Their seed is perceived as an inferior "discount" seed. The lower prices which these "price takers" receive for their seed reflects this fact. Farmers are unlikely to entrust their livelihood to this unproven seed, particularly when they cannot expect to be reimbursed for a failed crop.
- The linchpin of Asgrow's argument is that the terms "marketing" and "selling" are synonymous, but the separate treatment at Sections 2541(1) and 2541(3) of these words establishes that they have independent meanings.
- Asgrow's interpretation guts the farmer's exemption. In the case of soybeans, sales under the farmer's exemption would be limited to 1/45th of a crop. Yet the Court has long recognized that exceptions in statutes deserve their own life even if, by their nature, they work against the broader general purposes of the underlying statute.

In actuality, Petitioner's latest interpretation, just as its earlier interpretations, rests on the unstated premise that the literal reading of the PVPA must be ignored, and the farmer's exemption sacrificed, in order to further the interests of plant breeders and the nation. This premise is unsupported by the record and quickly dissolves under scrutiny.

The PVPA reflects a political compromise between the centuries-old right of farmers to sell seed to other farmers for seeding purposes on the one hand, and new property rights to be afforded plant breeders on the other. The compromise reflects the fact that cultivars presented to the PVPA by plant breeders for certification need not even represent an improvement over existing varieties. Rather, plant variety protection certificates may be granted for varieties which are only cosmetically different from the cultivars developed by small farmers over decades, and which have been refined by state seed research institutions financed in part by excise taxes on farmers. In essence, the PVPA presented an opportunity for multinational pharmaceutical and chemical companies, who have taken over most private breeding firms, to monopolize plant germplasm after making only negligible alterations to it. With an appreciation, however, of the practical problems of farmers who have to cope with intellectual property rights over their primary source of livelihood, Congress struck a balance by providing for the farmer's exemption. This compromise should not be disturbed by this Court.

ARGUMENT

I. THE HOLDING OF THE FEDERAL CIRCUIT CONFORMS TO THE PLAIN LANGUAGE OF THE STATUTE.

The decision of the Federal Circuit fundamentally conforms to the language and purposes of the PVPA and its farmer's exemption. Ultimately, the PVPA is a political compromise balancing farmers' interests in traditional and accepted farming practices against unprecedented "patent-like" protection for developers of sexually reproducing plants. In striking this balance, Section 2543 provides a farmer the right to save seed produced from a protected variety, and corollary rights to use the seed on his or her farm or to sell it for reproductive or non-reproductive purposes as specifically provided.

Section 2543 imposes no restriction on the amount of seed a farmer can *save*. The reference in the introductory "except" clause to Section 2541(3) does restrict the *purpose* for which a person can save the seed—a farmer cannot save it for the purpose of "sexually multiply[ing] the seed as a step in marketing (for growing purposes) . . . ." The second part of Section 2543, after the "provided" clause, allows a person whose "primary farming occupation is the growing of crops for sale for

other than reproductive purposes" to sell any seed he or she has saved to other farmers similarly engaged. The only quantity limitation, either explicit or implicit, in either part of Section 2543, is the implicit limitation requiring "the primary farming occupation" of the seller to be the "growing of crops for other than reproductive purposes." As long as the farmer has sold less than 50 percent of his or her crop for reproductive purposes, it can safely be presumed that his or her primary farming occupation "is the growing of crops for other than reproductive purposes."

Asgrow's and the amici's varying arguments that the reference to Section 2541(3) somehow limits the quantity of seed that can be saved are unsound. It limits only the purpose for which seed can be saved, not the quantity. Because the second part of Section 2543 expressly disclaims the applicability of Section 2541(3), it does not in any way limit the amount of saved seed that can be sold by one whose "primary farming occupation is the growing of crops for sale for other than reproductive purposes."

This conclusion is inevitable when the statute is examined in detail. The exemption under Section 2543 provides for a farmer's right to save otherwise protected seed and exempts certain uses of this seed from the infringement provisions of Section 2541. As to the right to save seed, the section states in relevant part:

> Except to the extent that such action may constitute an infringement under subsections (3) and (4) of section 2541 of this title, it shall not infringe any right hereunder for a person to *save seed* produced by him from seed obtained, or descended from seed obtained, by authority of the owner of the variety for seeding purposes and use such saved seed in the production of a crop for use on his farm, or for sale as provided . . . .

7 U.S.C. § 2543 (emphasis added). This language provides the crucial right to save seed, and as the Federal Circuit recognized, it is unmodified as to the quantity of seed that may be saved. Pet. App. at 6a. Even Asgrow recognizes that seed may be saved without limit. *See* Pet. Br. at 17-18. However, the leading phrase of the section places restrictions on this right. A farmer may save any quantity of seed as long as it is not for the purpose of sexually multiplying the protected seed as a step in marketing it for growing purposes[5] or for producing a hybrid. Additionally, the farmer has two corollary rights with respect to this saved seed: to use it on his or her farm or to sell it under the conditions set forth in the second part of Section 2543.[6] The first corollary right to use it on the farmer's own farm is not at issue in this case.

With respect to the second corollary right, the second part of Section 2543, after the italicized "*Provided*," sets forth the conditions for a narrow class of permitted sales for reproductive purposes:

> *Provided*, That without regard to the provisions of Section 2541(3) of this title it shall not infringe any right hereunder for a person, whose primary farming occupation is the growing of crops for sale for other than reproductive purposes, to sell such saved seed to

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[5] As seen, Section 2543 begins, "[e]xcept to the extent that such action may constitute an infringement under subsections (3) and (4) of section 2541 of this title, ..." Section 2541 defines infringement under the PVPA. Subsection (3) of 2541 prohibits one from sexually multiplying protected seed as a step in marketing it for reproductive purposes. Contrary to Asgrow's claim, this subsection does not impart a quantity limit on the amount of seed that can be sold; it merely restricts the purpose for which one can use the seed. Subsection § 2541(4) is not at issue in this case.

[6] Likewise, the Federal Circuit held, "the crop exemption allows those farmers who may save seed to use it to produce a crop on their own farm or to sell it under limitations within the exemption." Pet. App. at 7a.

> other persons so engaged, for reproductive purposes, provided such sale is in compliance with [applicable] State laws. . . .

7 U.S.C. § 2543. This language provides an exception for a narrow class of sales. It allows *only* farmers whose primary farming occupation is the growing of crops for nonreproductive purposes to sell saved seed to other farmers who likewise do not grow crops primarily for reproductive purposes. Pet. App. at 7a-8a. Only this limited class of sales may be for reproductive purposes. Additionally, these sales must conform to any applicable state laws.

It is the quantity of saved seed salable under this portion of Section 2543 that is at issue in this case. Petitioner maintains that the first iteration of Section 2541(3) in Section 2543 limits this quantity to that amount needed for replanting the farmer's crop for the next season; any amount in excess of such quantity would necessarily be a quantity sexually multiplied as a step in marketing it for reproductive purposes. Pet. Br. at 22. Subsection 2541(3) prohibits this kind of sexual multiplication. However, the plain language of Section 2543 contains no such limitation. Section 2543's simple structure is as follows: (1) a farmer may save seed descended from protected seed except for the purpose of sexual multiplication as a step in marketing it for reproductive purposes; (2) that farmer may use the seed on the farmer's own farm or sell it subject to certain limits; and (3) a specified class of sales for reproductive purposes is exempt from liability under Section 2541(3). Nothing about this structure or the section's language entails anything like petitioner's quantity limit. In fact, Section 2543's second iteration of Section 2541(3)—excepting the farmer from liability for sexual multiplication of the protected seed—connotes that a farmer may sell for reproductive purposes saved seed in a quantity *in excess* of that necessary to replant the crop in the next season. *Multiplication* implies

reproduction in a greater than a one-to-one relation,[7] and it is multiplication that the second iteration of Section 2541(3) exempts.[8] This right is not unlimited, however.

The section places several conditions on this exemption for a limited class of sales for reproductive purposes. The primary farming occupation of both the selling and buying farmer must be the growing of crops for other than reproductive purposes. Attributing "primary" with its customary definition, the Federal Circuit held that a farmer, thereunder, can "sell less than half of the crop grown from the specific novel variety as brown bag seed." Pet. App. at 8a. Thus, these limits on both ends of the sales transaction preclude a widespread and systematic operation from directly competing with the certificate holder. For example, a farmer cannot sell seed produced from protected varieties for reproductive purposes as the farmer's primary farming occupation. Because of the structure of the exemption, such a "farmer" could neither sell nor purchase any brown bag seed. Furthermore, a farmer cannot participate in large scale indirect competition with the certificate holder by selling brown bag seed to a marketing operation, such as a seed wholesaler, engaged in selling such seed.[9] In all, the exemption protects the

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[7] Multiplication is defined as the "act or process of multiplying, or *increasing in number*." WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1610 (2d ed. 1961) (emphasis added).

[8] Indeed, petitioner seems particularly concerned with this multiplied quantity. *E.g.*, Pet. Br. at 22. However, it is sales of saved seed in precisely such multiplied quantities that the second iteration of § 2541(3) exempts.

[9] The structure of Section 2541 reinforces this construction. It separately prohibits sales of the protected variety and its sexual multiplication as a step in marketing it for growing purposes. 7 U.S.C. § 2541(1) & (3). Of course, Subsection 2541(1)'s prohibition against sales of the protected variety is sufficient in and of itself to prevent all sales of it, whether for reproductive or nonreproductive purposes. Therefore, the independent proscription against

certificate holder from direct competition by large scale farmers and from marketing operations. It allows only relatively small scale, informal sales from one farmer whose primary use of such produced seed is for non-reproductive purposes to other such farmers.[10] Lastly, these sales must conform to state laws governing seed sales.

The third part of Section 2543 provides an exemption for sales of saved seed for nonreproductive purposes. This section provides in relevant part:

> A bona fide sale for other than reproductive purposes, made in channels usual for such other purposes, of seed produced on a farm either from seed obtained by authority of the owner for seeding purposes or from seed produced by descent on such farm from seed obtained by authority of the owner for seeding purposes shall not constitute an infringement.

7 U.S.C. § 2543. Under this portion of Section 2543, anyone may sell saved seed for nonreproductive purposes without infringing a certificate holder's rights.

This simple construction gives effect to all words and purposes of Section 2543 and imparts significance to its two references to Section 2541(3). In conferring the right to save seed, the first portion of Section 2543 exempts farmers from liability under Section 2541 by allowing them to save seed as long as it is not saved for purposes of sexual multiplication as a step in marketing it for reproductive purposes. Thus, the first iteration makes it clear that, in spite of the Section 2543 exemption, a farmer may be liable under Subsection 2541(3) for sexual multiplication as a step in marketing for reproductive purposes. The second part of Section 2543, with the second iteration of Section 2541(3), exempts from Section 2541(3) liability *only* that class of sales from a farmer whose primary farming occupation is the growing of crops for nonreproductive purposes to another such farmer. The second iteration applies, therefore, to a narrower class of sales than the overall Section 2543 exemption. Without this second iteration, these sales would still be subject to Section 2541(3) liability. Lastly, Section 2543 allows more liberal sales of saved seed for nonreproductive purposes. This straightforward construction gives effect to all words and purposes of the section without Asgrow's conjured notions of a quantity limit.

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sexually multiplying the seed as a step in marketing it for reproductive purposes contemplates a broader range of activities. The proscription, for example, precludes a farmer from entering a service contract to produce seed from a protected variety for a marketing operation competing with the certificate holder.

[10] The structure of the PVPA and the farmer's exemption precludes a farmer from large scale direct competition with the certificate holder because such farmer would always have to use the majority of his or her crop for nonreproductive purposes. A farmer's investment and operation will always be constrained by the nonreproductive purposes to which the farmer can put such a crop.

II. ASGROW'S INTERPRETATION OF THE FARMER'S EXEMPTION CANNOT WITHSTAND SCRUTINY.

Asgrow asks the Court to accept a contrived interpretation of a statute to preserve its rendition of statutory intent. Asgrow's effort to obtain legislative relief from this Court should be rejected.

A. None of the Four Versions of the "Ensuing Crop Limitation" Proffered in This Case Accurately Construes the Farmer's Exemption.

Asgrow asserts that the "ensuing crop limitation" flows naturally from the statutory language of the PVPA. Pet. Br. 17. Oddly, however, in this single case, there have been four separate versions of statutory interpretation used to to derive the "ensuing crop limitation." Asgrow's current version of the ensuing crop limitation differs from the version adopted by the District Court, from the version Asgrow pressed before the Federal Circuit, and from

the version proffered before this Court by the Solicitor General. This fact alone shows how the imputed quantity limitation tortures the statutory language. Furthermore, not one of the four versions of the "ensuing crop limitation" is convincing.

1. *Asgrow's Current Analysis Is Demonstrably Faulty, and Conflicts With Its Argument Before the Federal Circuit.*

Asgrow's position is summarized as follows in its brief:

> Through that initial incorporation of the terms of section 2541(3), the first sentence of section 2543 does not apply where a person has sexually multiplied a novel variety as a step in marketing. . . . At most, only the quantity of PVPA seed that was sexually multiplied *not* as a step in marketing the variety for growing purposes can be permissibly sold under . . . section 2543. That limited amount is the portion of the farmer's crop that he retains for use in the production of a crop on his farm. Moreover, it is the only portion of the crop produced to which the provision allowing a farmer to "sell such saved seed" under certain conditions even applies.

Pet. Br. at 13.

Asgrow's analysis turns on the proposition that "saved seed" may be used by a farmer for only one purpose—in the production of one crop for use on his farm. Thus, when a farmer intends to sexually multiply a protected variety, thereby disqualifying as "saved seed" that portion of the farmer's crop (and thereby infringing the certificate), the only purpose left is "the production of a crop for use on his farm." In the case of soybeans, the production of a crop consumes 1/45th of the farmer's harvest. *Thus, Asgrow's newly found analysis is dependent upon a reading of Section 2543 pursuant to which the phrase "or for sale as provided in this section" is written out of the farmer's exemption.* When sales offending Section

2541(3) are contemplated, the amount of saved seed which can be used, by default, is that amount needed to grow one crop.

Contrary to this analysis, however, this is not the "only portion of the crop produced" which may be sold as saved seed under the provision. After the phrase "or for sale as provided in this section" of Section 2543, sales involving *two* distinct purposes are considered. First, the provision contemplates sales by farmers whose primary occupation is farming to others so engaged. Second, the provision contemplates sales "for other than reproductive" (consumption) purposes in channels usual for such purposes. In short, under Section 2543 a farmer may save seed produced from a protected variety, without any quantitative limits, and he or she may use "such saved seed" for any of three purposes: production of an ensuing crop on his or her farm; sales to other farmers for reproductive purposes; or sales for non-reproductive purposes in the usual channels.

When all of the language of Section 2543 is considered, a farmer does not default to one crop upon contemplating multiplication as a step in marketing. Rather, he or she still may use "such saved seed" (a) in qualifying sales for reproductive purposes to other farmers, and (b) in bona fide sales for non-reproductive purposes.

It is clear that Congress recognized that seed could be saved for non-reproductive sales, as well as for reproductive sales. Before the final version of Section 2543 was passed by Congress, there was a separate "Crop Exemption" which provided that seed obtained "by saving seed" could be sold for "food, feed, in manufacture or the like." H.R. 13631, 91st Cong., 2d Sess. § 114 (1969). Indeed, before the district court, Asgrow explicitly recognized that farmers may save seed for use on their farms for sale as grain, or for sale as seed (reproductive purposes):

> [U]nder 7 U.S.C. § 2543, a farmer may "save seed" produced by him from seed obtained by authority of the variety owner and use the "saved seed" in the production of a crop for use on his farm or for sale as grain. The farmer may sell such "saved seed" to another farmer if he decides, for some reason, not to use some or all of his "saved seed."

Asgrow Memorandum in Support of Motion for Summary Judgment, May 22, 1991, at 6.

This statement conflicts with the analysis to which Petitioner now subscribes. Upon violating Section 2541(3) by sexually multiplying the variety as a step in marketing (for growing purposes), or upon contemplating such a violation, the saved seed is not automatically limited to one crop. Rather, the farmer may save seed for the other two uses, namely, in qualified sales to other farmers for reproductive purposes and in bona fide channels for non-reproductive purposes. Sales by farmers whose principal occupation is farming to other such farmers is thus permitted, "without regard to the provisions of Section 2541(3)." Thus, as explained by the Federal Circuit, so long as proscribed marketing practices are not undertaken, the farmer may multiply the seed for reproductive purposes.

2. *The Analysis of the United States Is Likewise Faulty.*

The Solicitor General essentially proceeds on the same path as Petitioner, but with a different twist. At page 14 of his brief, the Solicitor General states, correctly, that the farmer may "use such saved seed in the production of a crop for use on his farm, or for sale as provided in this section." 7 U.S.C. § 2543. Then, in a surprising non sequitur, in the very next sentence the Solicitor General fails to give any import to the phrase "or for sale as provided in this section": "In other words, the farmer may use seed that has been produced from protected seed, and then saved, for the purpose of producing another crop." Sol. Gen. Br. at 14.

But what happened to the phrase "or for sale as provided in this section" (*i.e.*, to other farmers whose principal occupation is farming, and bona fide sales for non-reproductive purposes)? Inexplicably, the Solicitor General argues that such sales apply only to *subsequent* crops by the farmers!

> Thus, although the ensuing *crop* may either be used on the farm or be sold to others, the use of the "saved seed" itself that is permitted by the opening clause of Section 2543 is limited to the "production of a crop."

Sol. Gen. Br. at 14 (emphasis in original). Thus, like magic, Section 2543, which never before contained any limits on the quantity of seed which may be saved and sold under the farmer's exemption, is now limited, in the case of soybeans, to 1/45th of the farmer's crop.

The Solicitor General's argument ignores that the first responsibility of a court in interpreting a statute is to analyze the language of the statute, and not to rewrite it to conform to perceived purposes. *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 5 (1985) (the "starting point" of statutory interpretation is "language of the statute"); *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 330 (1978). The courts should not reinterpret statutes on the premise that they can better express the Congressional purpose. *United States v. Rutherford*, 442 U.S. 544, 555 (1979) ("federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with . . . public policy' "); *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 126 (1989) ("Our task is to apply the text, not to improve upon it.").

Virtually every exemption to a law by definition works against the "primary" purpose of the statute. This does not mean that the exemption should be sacrificed. As this Court has noted, "no legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525-

26 (1987); *see also West Virginia University Hospital v. Casey*, 499 U.S. 83, 98 (1991) ("the purpose of a statute includes not only what it sets out to change, but also what it resolves to leave alone."); *Women Involved in Farm Economy v. U.S. Dept. of Agriculture*, 876 F.2d 994, 1002-03 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990) ("district court's approach—focusing only on the overall purpose of the statute and disregarding the purpose of the [statutory] limitation—was quite artificial.").

3. *The Other Two Versions of the Ensuing Crop Limitation Appearing in This Litigation Also Are Defective.*

A third version of the "ensuing crop limitation" appears in the District Court's order. The District Court, in order to reach the result it felt was consistent with the general purpose of the PVPA, edited out crucial portions of Section 2543 to imply that the phrase "for seeding purposes" modifies the term "save seed":

> The language of the statute is that, "it shall not infringe any right hereunder for a person *to save seed produced by him . . . for seeding purposes* and use such saved seed in the production of a crop for use on his farm, or for sale as provided in this section . . . ."

Pet. App. at 21a (emphasis in original). All parties apparently now agree that the District Court's version of the ensuing crop limitation was flawed. As pointed out by the Federal Circuit, the phrase "for seeding purposes" modifies the word "obtained," not the word "saved." Pet. App. at 11a-12a.

Another version of the ensuing crop limitation appears in Asgrow's brief before the Federal Circuit. There, Asgrow maintained that Section 2543 should be broken into two parts, an on-farm seed use exemption and an off-farm seed use exemption. The former, Asgrow argued,

applies where the farmer either uses the crop produced from the saved seed on his farm or sells it for non-reproductive use. The latter applies where a qualified farmer sells to another for reproductive purposes, and the sale is made from "saved seed." Because the term "saved seed" must have the same meaning in both parts of Section 2543, Asgrow argued, the farmer should not be allowed to sell any more under the off-farm exception than pursuant to the on-farm exemption, namely, the amount of seed used in planting next year's crop. Presumably, the awkwardness of this version of the ensuing crop limitation persuaded Asgrow to abandon it upon seeking en banc review before the Federal Circuit.[11]

In total, there have been four versions of the "ensuing crop limitation." If this limitation flowed from a natural reading of the statute there would not be four separate permutations of statutory interpretation used to reach the limitation.

4. *The Term "Marketing" in Section 2541(3) Contemplates Activities Other Than "Selling."*

The linchpin of Asgrow's argument (and that of the Solicitor General) is that the term "marketing" in Section 2541(3) must be defined to encompass selling. Unless marketing includes selling, the one crop limitation cannot be invoked and the analysis fails. Both Asgrow and the Solicitor General insist that the term be accorded its "ordinary, common meaning," *i.e.*, "marketing encompasses selling."[12] Pet. Br. at 20; Sol. Gen. Br. at 12.

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[11] In its Petition for Certiorari, Asgrow acknowledged that its current statutory approach differs from that before the Federal Circuit panel. Pet. at 10 & n.10.

[12] The Solicitor General cites in footnote 10 of his brief instances in other statutes where marketing means selling. In each cited instance, however, the term "marketing" was explicitly defined in that statute for its particular purposes. No such definition is present in the PVPA.

The Federal Circuit correctly dealt with this contention. First, the Court noted that Asgrow's interpretation is so expansive that it "would swallow the entire crop exemption." Pet. App. at 12a. The provisions of Section 2543 permitting qualified farmers to sell to other farmers for reproductive purposes would *always* run afoul of Section 2541(3), thereby rendering the exemption meaningless. Second, in its opinion rejecting rehearing, the Court noted that since "selling" a protected variety is treated in Section 2541(1), the use of "marketing" in Section 2541(3) indicates that a different meaning was intended. Third, the Court's definition is a natural reading of the statute that gives life to all of the provisions of the farmer's exemption. Congress assuredly wished to prohibit attempts by persons to avoid the prescriptions of the PVPA by entering into contracts with farm cooperatives, cotton gins, middlemen, and other agents to multiply protected seed. Thus, the Federal Circuit held that "marketing" in the context of the PVPA "means extensive or coordinated selling activities, such as advertising, using an intervening sales representative, or similar extended merchandising or retail activities." Pet. App. 12a-13a.

The phrase, "[t]hat without regard to the provisions of Section 2541(3)" preceding "it shall not infringe any right hereunder for a person whose primary occupation . . ." is given a practical meaning by the Court. This portion of Section 2543 clarifies that direct sales by qualified farmers to other qualified farmers do not constitute marketing activities prohibited under the PVPA. Of course, the farmer remains subject to these marketing proscriptions.

Finally, under the Winterboers' analysis, even if the meaning of "marketing" is extended beyond its natural limit (to include selling), there is still no ensuing crop limitation. If we assume that the term "marketing" includes selling, persons whose principal occupations are the growing of seed for non-reproductive purposes may

sell to other similarly situated farmers "without regard to the provisions of Section 2541(3)." Stated differently, whatever the constraints contained in the term "marketing," they do not apply to those who primarily are farmers. All others, however, remain bound by these constraints by the first iteration of Section 2541(1) in Section 2543.

B. The Agencies Charged With Administering the Statute, the Judiciary, and Legal and Academic Commentators Agree With the Winterboers' Reading of the Farmer's Exemption.

Asgrow's assertion that the "ensuing crop limitation" is consistent with the express wording of Section 2543 also is belied by the fact that prior to this litigation, virtually all published comment on the PVPA, including that of the Plant Variety Protection Office and the United States Department of Agriculture, interpreted the farmer's exemption to allow sales for reproductive purposes between buyers and sellers who are both primarily farmers without the one crop limitation.

The PVPA is administered by an office within the Department of Agriculture, the Plant Variety Protection Office ("PVPO"). In a 1973 interpretation, S.F. Rolling, then Commissioner of the PVPO, stated:

> There is no limitation as to the amount of sales permitted a grower under section 113 of the Act except to the extent it may affect his "primary farming occupation" classification upon which the exemption is based. The courts will have to decide what is a farmer's primary farming occupation.

(JA13). The PVPO thus made clear that it is the "primary farming occupation" language, not the "saved seed" language, that is the focus of the farmer's exemption.[13]

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[13] The Solicitor General seeks to downplay the significance of the Commissioner's 1973 interpretation. Sol. Gen. Br. at 15 n.12. Contrary to the Solicitor General's analysis, however, the fact that

Similarly, an employee of the Department of Agriculture in 1976 stated that the farmer's exemption "permits an authorized grower to use and sell his reproduced seed to another grower provided neither is in the seed business." Bernard M. Leese, Jr., *U.S. Plant Variety Protection Act and Its International Role*, 63 ACTA HORTICULTUREA 145, 148 (Dec. 1976).

Likewise, in a publicly distributed informational pamphlet published in 1977, the Department of Agriculture described the farmer's exemption in the following manner:

> The PVPA specifies that seed of a protected variety may be used by a grower whose primary occupation is the growing of crops for food or feed and not primarily the growing of crops for seeding purposes. A grower who has obtained the seed with the authority of the Certificate owner may use the seed to grow a crop and save the seed which results from that crop. *The grower may also sell the reproduced seed to a second grower whose primary occupation is growing crops for food or feed.*

U.S. Department of Agriculture, Agricultural Marketing Service, Pub. No. PA-1191, PLANT VARIETY PROTECTION: HOW IT WORKS FOR YOU 6-7 (June 1977) (emphasis added). There is no mention of the ensuing crop limitation; the only limitation noted by USDA is that the primary occupation of both the first and second grower must be the growing of crops for food or feed. These early administrative interpretations, representing the agencies' first attempts at construing a new regulatory concept, are

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the Commissioner does not discuss the marketing prohibition of Section 2541(3) merely confirms that sales between parties whose primary occupations are farming are not prohibited. The Solicitor General's suggestion that there might have been a view within the USDA on the farmer's exemption separate from the view of the PVPO Commissioner, the highest officer in the USDA dealing solely with the PVPA, strains credulity.

entitled to heightened deference. *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933).[14]

The American Seed Trade Association urged the USDA in 1987 to issue regulations to embrace the "one-crop" limitation. The USDA declined, correctly noting that it did not have the power to accomplish this result by regulation. (JA20). One can assume that the agency determined it lacked the authority to issue such a "clarifying" regulation because such a regulation would have been completely opposite the plain language of the statute; after all, the agency has issued extensive regulations governing other aspects of the PVP regime. *See* 7 C.F.R. Part 97.

The judicial branch, in the only decision prior to this litigation concerning how much seed a farmer can sell under the farmer's exemption, also read the farmer's exemption broadly. In *Asgrow v. Kunkle Seed Co.*, No. 86-3138-A (W.D. La. April 1, 1987), *aff'd*, 845 F.2d 1034 (Fed. Cir. 1988) (table), it was determined that the farmer's exemption allowed a farmer to sell up to 49% of his or her crop as seed, that is, as long as the farmer's primary occupation was farming.

In addition to both the executive and judicial branches having read the farmer's exemption to allow sales between farmers as long as neither are in the seed business, most published legal and academic commentators have agreed. One commentator of particular note is Sidney Williams, Counsel for Upjohn, who appears as counsel for Upjohn's

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[14] According to the Solicitor General's brief, the USDA now supports Asgrow's interpretation of the farmer's exemption, despite the USDA's numerous prior representations adopting a less strained reading of the exemption. Sol. Gen. Brief at 15 n.12. Where administrative agencies have been inconsistent in their interpretation of a statute, their views are entitled to less deference. *See Equal Employment Opportunity Commission v. Arabian American Oil Co.*, 499 U.S. 244, 257-58 (1991); *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987).

subsidiary, Asgrow, before this Court. At a 1987 conference, Mr. Williams described the farmer's exemption as follows:

> The so-called "Farmers Exemption" is set forth in 7 USC 2543 and it allows a farmer to do the following with a protected variety obtained on authority from the certificate owner without infringing the certificate:
>
> (1) Save the seed or seed descended from such seed for production crops for use on his farm or for sale.
>
> (2) Save the seed from a crop produced from the seed for future use or sell [*sic*] on the farm.
>
> (3) To sell the seed to others who will use it for the purpose of producing crops for sale.

Sidney Williams, *The Future of the Plant Variety Protection Act in the USA*, *in* FIFTH INTERNATIONAL COLLOQUIUM ON THE PROTECTION OF PLANT BREEDERS' RIGHTS (1987). Mr. Williams' 1987 understanding of the farmer's exemption did not involve any quantitative limit on the right to save or sell seed, or any "ensuing crop limitation"; rather, Mr. Williams noted that the exemption "allows a farmer . . . to sell the seed to others who will use it for the purpose of producing crops for sale."

Other commentators have observed that the farmer's exemption allows limited competition by farmers with seed companies in the sale of PVPA-protected seed. Thus,

> so long as the crop farmer's primary farming occupation remains growing crops for uses other than for seed purposes [, the farmer] can engage in a part-time seed business, competitive with another local handler, without incurring the expense of a royalty payment to the owner-inventor of a certified seed variety.

Jack E. Houston *et al.*, *Uncertainty and Structural Issues Facing the Seed Handling Industry*, 4 AGRIBUSINESS 347, 349 (1988). The Office of Technology Assessment of the United States Congress concurs:

> The farmer's exemption provision of PVPA . . . allows farmers to retain protected seed for planting and for sale to others whose principal occupation is also farming. . . . In effect, farmers can compete, to a limited degree, directly with the seed industry that developed the variety, as long as the primary occupation of the farmer is production agriculture.

U.S. Congress, Office of Technology Assessment, NEW DEVELOPMENTS IN BIOTECHNOLOGY: PATENTING LIFE 79 (1990).

Of all the commentators acknowledging the right of farmers to sell seed to others as long as both parties primarily are engaged in farming, perhaps the most authoritative is the testimony of the organization that authored the original PVPA bill, the American Seed Trade Association. In 1990, testifying before a Subcommittee of the House Committee on Agriculture in a hearing on recommended amendments to the PVPA, the president of the ASTA stated:

> Unfortunately, the [farmer's] exemption as enacted allows any person "whose primary farming occupation is the growing of crops for sale" to sell the seed to others so engaged. This unfortunately overbroad wording can be and has been applied to sales far more damaging to seed developers than simple over-the-fence sales among neighbors.

Proposed Amendments to the Plant Variety Protection Act: Hearings Before the Subcomm. on Department Operations, Research, and Foreign Agriculture of the House Comm. on Agriculture, 101st Cong., 2d Sess. 27 (1990) (Statement of Jerome J. Peterson, President, American Seed Trade Association). Now that it is before the Supreme Court, however, the ASTA maintains that the language of the farmer's exemption "compels an interpretation limiting the amount of protected seed a farmer

may sell to the amount saved to grow another crop." ASTA Amicus Br. at 5.

In contrast to this wide body of authority—the Executive, the Judiciary, scholarly commentators, and the trade association that wrote the original draft of the PVPA—Asgrow has failed to quote a single source outside the context of this litigation that has read the farmer's exemption in a manner consistent with the "ensuing crop limitation." Yet Asgrow insists that its proffered limitation is consistent with "the express wording of the statute." Pet. Br. at 17. The fact that only Asgrow is capable of discerning this reading of the "express wording" should give the Court pause.

C. Despite Wide Acknowledgement of the Breadth of the Farmer's Exemption, Congress Did Not Amend the Farmer's Exemption in 1980 or in 1990.

Despite the broad recognition since the 1970 passage of the PVPA that the farmer's exemption broadly allows sales of seed for reproductive purposes between persons whose primary occupation is farming, Congress has not chosen to amend the farmer's exemption. This suggests that the widely-held understanding of the breadth of the exemption comports with Congressional intent.

Congress has had ample opportunity to amend the exemption. In 1980, the PVPA was significantly amended to include certain previously excluded crops and to extend the length of protection from 17 to 18 years. Pub. L. No. 96-574, 94 Stat. 3350. Despite these extensive changes, and despite the generally accepted understanding of the farmer's exemption, Congress made no effort to change the farmer's exemption. Congress' decision to change parts of the statute but leave the farmer's exemption intact indicates that Congress did not disagree with the generally accepted understandings and administrative interpretations of the exemption. *See CBS, Inc. v. Federal Communications Commission*, 453 U.S. 367, 385 (1981).

Likewise, as noted above, in extensive hearings before Congress in 1990, the ASTA brought its concerns about the farmer's exemption to Congress. See Statement of Jerome J. Peterson, *supra* p. 29. Despite clearly being placed on notice of the ASTA's unhappiness with the farmer's exemption, Congress took ho action to amend the Act. Again, Congress' inaction upon being notified of the supposed problem indicates that Congress is satisfied with the currently-understood scope of the exemption. *See Blau v. Lehman*, 368 U.S. 403, 412-13 (1962).

D. Whichever Competing Limiting Interpretation Is Used the Result Is the Same—the Farmer's Exemption Is Eviscerated.

Under any of the "ensuing crop limitation" interpretations put forth by Asgrow and its supporters during the litigation of this case, one result is clear—the farmer's exemption would be eviscerated. The ensuing crop limitation would relegate the Winterboers to sell to other farmers no more than 1/45th of their soybean crop. Thereby, the right of farmers to sell seed to other farmers, enjoyed from the beginning of agriculture, would be effectively eliminated. More importantly, the balancing of political, economic and social considerations adopted by Congress and expressed in the PVPA would be recast.

Asgrow's contention that the farmer's exemption functions in a manner partly contrary to the primary purposes of the Act—the granting of protection to developers of new varieties—is not a startling observation, nor a particularly significant one. It is obvious that any exception or exemption in a statutory scheme may work at cross purposes to other, more general statutory purposes. This does not mean that the exemption must be stricken from the statute. Rather, the exemption is entitled to the same respect as the rest of the statute. *Mertens v. Hewitt Associates*, 113 S. Ct. 2063, 2071 (1993) ("vague notions of a statute's 'basic purpose' are

. . . inadequate to overcome the words of its text regarding the *specific* issue under consideration").

Exemptions in intellectual property statutes are not to be automatically rejected merely because they impinge on the property-owner's prerogatives. For example, the Copyright Act limits the copyright owner's exclusive control over copyrighted work by allowing fair use of the material. The courts may not ignore this exemption in pursuit of absolute protection for the copyright owner. 17 U.S.C. § 107; *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164 (1994). Likewise, the farmer's exemption should not be read out of the PVPA merely because of an alleged conflict between the exemption and the general purpose of the statute.

E. Brown-Baggers Compete With Breeders on the Fringe of the Market and Pose No Serious Threat to Their Activities.

One of Asgrow's central tenets of Asgrow's is the contention that "brown-baggers" pose a serious competitive threat to seed breeders. Thus, according to Asgrow, unless the Court interprets Section 2543 of the PVPA contrary to its plain meaning to eliminate this activity, breeder's rights under the Act will become meaningless, an "absurd consequence." Pet. Br. at 17. This contention is demonstrably wrong.[15]

If at all, brown-baggers compete with breeders of certified seed at the fringes of the market. The general perception in the industry is that brown-bagged seed is an inferior and lesser quality seed. Asgrow and other breeders raise seed under very carefully controlled conditions. Contract agents must enter into contracts affirming they

[15] Unfortunately, there is no "record" of developed facts on this and other Asgrow contentions. Asgrow's "General Factual Background" is blatantly partisan and insupportable. Indeed, most of the "facts" are little more than the excited hyperbole of lawyers. Of course, Congress, not this Court, is the proper forum for entertaining and sorting out these viewpoints.

will adhere to rigorous growing conditions. These requirements are designed to ensure that quality, such as plant purity and growing characteristics, including germination rates, are protected. Indeed, Tanimura & Antle, Inc., a California grower and shipper of vegetable produce, in an amicus curiae brief filed before the Federal Circuit, stated that they generally buy seed from commercial growers because the quality of the seed supplied "is often much better than the quality of the seed T&A could produce itself." Brief for Amicus Curiae Tanimura & Antle, Inc. at 2 (March 6, 1992).

In addition, farmers are extremely dependent upon the quality of the seed for their livelihood. A seed which fails to germinate properly or to produce plants of the type expected could destroy a year's work and undermine the farmer's finances. The typical farmer, faced with substantial debt, is unlikely to risk significant crop loss by buying seed from his or her neighbor. The same farmer can always look to an Asgrow for the lost profits from crops that fail to germinate, and expect to be compensated. The same farmer cannot expect the Winterboers to guarantee their crops.

Further evidencing this "discount" market in which brown-baggers operate is the disparity between the prices they command and those commanded by the commercial breeders. The record discloses that the Winterboers sold their 1990 crop for approximately $8.70 per bushel; Agrow's agents sell soybean for approximately $16 per bushel. Agrow, mistakenly, decries this difference with the statement that the Winterboers can charge less because they are not required to amortize the costs of plant research and development. Pet. Br. at 7 & n.5. But farmers are *price-takers*, not price setters.[16] Thus, the

[16] That is, the quantity of a crop they put on the market has no effect on the crop's market price and the farmer must sell at the going market price. See, C.S. Barnard & J.S. Nix, FARM PLANNING AND CONTROL 21 (1973) ("If the level of output has no effect on the price per unit received, as is usually the case in farming . . . .)

market, not the brown-bagger, determines the price of its crop sold for seed. The price differential is an irrebuttable statement that brown-bag seed serves a different, or discount, market.

Finally, because of the development of this case below, discovery has not been pursued on a fact fundamental to Asgrow's position. According to the testimony of Denny Winterboer, the only reason his sales were so robust is the fact that there existed a shortage of Asgrow varieties A1937 and A2234 in the Clay County, Iowa area. Although Asgrow later disputed this point, the Winterboers are prepared to establish this fact at trial.

F. Asgrow's "One Ensuing Crop" Limitation of the Farmer's Exemption Would Severely Penalize Vegetable Seed Growers, Who Commonly Save Five Years of Seed, and Otherwise Is Unenforceable.

Asgrow maintains that the opening sentence of Section 2543, because of its reference to Section 2541(3), prevents a farmer from selling to farmers more seed than that required to plant one crop. It takes this position despite the explicit clause, "notwithstanding the provisions of section 2541(3) . . ." in the second part of Section 2543. This interpretation may be consistent with its experience as a soybean and wheat developer. Unfortunately, Asgrow's interpretation, if adopted, would pose grave difficulties for vegetable seed growers.

In an amicus brief filed with the Federal Circuit, Tanimura & Antle, Inc., explained that the farmer's exemption "is of unique importance and usefulness to western vegetable growers." Brief for Amicus Curiae Tanimura & Antle, Inc. at 5 (March 6, 1992). The company explained that the limitation on the farmer's exemption to one crop would have a severe impact on its operation because vegetable growers commonly *save seed for four or five future crops*:

> The need to grow seed plants separately, rather than gathering seed as part of ordinary harvest operations, and the relative difficulty of growing good quality seed of vegetable crops means that the seed can only be produced efficiently and effectively in large quantities, since much of what is produced is likely to be discarded as of low quality. For this reason, seed of vegetable crops is ordinarily grown on a large-scale basis, with as much as a four or five year supply grown and collected at once.

Brief for Amicus Curiae Tanimura & Antle, Inc. at 5 (March 6, 1992). Tanimura & Antle thus urged the Federal Circuit to at least correct the implication in the District Court's decision that the right to save seed was limited to the amount of one ensuing crop. Asgrow's proffered limitation on the right to sell seed rests on a limitation on the right to save seed, because if a farmer saved more than the amount needed to plant one ensuing crop "he must be presumed to have done so in order to sell it as seed [and] such seed will necessarily have been sexually multiplied as a step in marketing the novel variety for growing purposes." Pet. Br. at 22. By limiting the ability of farmers to save seed, Asgrow's proffered interpretation would harm those farmers that at times need to save more than the amount necessary to plant a single ensuing crop, such as vegetable growers.

Apart from markedly increasing the costs of western vegetables and decreasing such farmers' efficiency, the Asgrow interpretation is virtually unenforceable. Judge O'Brien noted that his interpretation raised significant enforcement problems:

> This Court realizes that allowing a farmer to save an amount of seed reasonably necessary to plant the next year's crop may lead to a situation where courts will be required to determine what amount of seed is reasonably necessary to plant the next year's crop.

Pet. App. at 22a n.3.

Indeed, the problems with such an imputed limitation are myriad. At what moment in time must the determi-

nation be measured? What if a farmer later decides to lease additional acreage? What if the farmer later loses a lease with a neighboring farmer to plant crops? What if growing conditions change, thus increasing the number of bushels required to grow one crop? These and many other real world factors would make the enforcement of the Act a nightmare, and would needlessly clog the courts with PVPA cases.

In fact, one of the purposes of the farmer's exemption is to reduce paperwork and enforcement duties for farmers. When the House of Representatives placed a farmer's exemption in the Transgenic Animal Patent Reform Act, H.R. 4970, 100th Cong., 2d Sess. (1988), it noted this as one of the salutary features of such an exemption. Modelled after the farmer's exemption in the PVPA, "the only other American intellectual property law that regulates rights in self-reproducing subject matter," the Report of the House Committee on the Judiciary stated:

> The existence of a farmers exemption has a number of beneficial results: (1) it reduces burdensome recordkeeping; (2) it avoids placing farmers in the role of patent enforcers; (3) it reduces uncertainty about the law; and (4) it will not destroy the market . . . .

H.R. Rep. No. 888, 100th Cong., 2d Sess. 73 (1988), *reprinted in* ANIMAL PATENTS: THE LEGAL, ECONOMIC AND SOCIAL ISSUES 257 (William H. Lesser ed. 1989).

The fact that Asgrow's proffered limitation on the right to save seed would be extremely harmful to farmers such as vegetable growers, and would create enforcement and paperwork headaches for farmers, are just two other factors indicating the problematic nature of the imputed limitation.

G. Important Public Policy Issues Support the Carefully Crafted Limitations by Congress in Enacting the PVPA.

Asgrow's real contention is that this Court should ignore the plain meaning of the farmer's exemption and embrace its restrictive interpretation because in its view, what is good for plant breeders is good for America. Asgrow insists that the protections under the PVPA must be made as strong as possible to maximize breeders' incentives to research. However, with the PVPA, as with all intellectual property protection, the socially optimum property rights regime is one which provides incentive for the appropriate amount of research in exchange for a reasonable distribution of the net gains from the new technology between the private investor and the public.[17] The fact is, there are several valid policy reasons justifying the limitation, in the form of the farmer's exemption, placed by Congress on seed companies' monopolization of plant genetic resources.

First, it must be appreciated that the showing that a breeder must make to obtain a certificate is meager. Unlike a utility patent, the applicant for a PVPA certificate need *not* now show "non-obviousness," or any utilitarian improvement over existing varieties. The standard used is "distinctiveness," "uniformity," and "stability." None of these measures is necessarily directly related to a cultivar's agronomic value.

The weak showing needed to qualify for PVPA certification is highly significant from a policy perspective. First, it allows private sector borrowing from public sector breeding research. "Varieties released by public

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[17] *See* Richard K. Perrin, *Intellectual Property Rights in the Public Interest, in* U.S. AGRICULTURAL RESEARCH: STRATEGIC CHALLENGES AND OPTIONS 181, 182-85 (Robert D. Weaver ed., 1993); A. Allen Schmid, *Biotechnology, Plant Variety Protection, and Changing Property Institutions in Agriculture*, 7 NORTH CENTRAL JOURNAL OF AGRICULTURAL ECONOMICS 129, 137 (July 1985).

experiment stations are backcrossed by private breeders to change some one or more of their descriptors such as chaff color in wheat and then patented and promoted as a new variety." Schmid, *supra* n.17, at 132. In this way, certificate holders appropriate for themselves the efforts of state research centers. The state research centers, in turn, relied upon plant cultivars that were developed by farmers over decades or even centuries. *See* David Wood, *Crop Germplasm: Common Heritage or Farmers' Heritage?*, in SEEDS AND SOVEREIGNTY: THE USE AND CONTROL OF PLANT GENETIC RESOURCES 274 (Jack R. Kloppenburg, Jr. ed. 1988). Given the derivation of such cultivars, it is not unreasonable to permit farmers, in the carefully defined situations identified by the Federal Circuit's decision, to sell PVPA-protected seeds for reproductive purposes to other farmers.

Second, the ease with which PVPA certificates can be obtained by private seed companies encourages economically wasteful "cosmetic breeding." The emergence of breeders' rights statutes has shifted breeding research resources from the public to the private sector, which has led to a shift in "the objective of the breeders . . . from that of increasing farm productivity to that of giving sales arguments to the marketing departments of the seed companies." Jean-Pierre Berland and Richard Lewontin, *Breeders' Rights and Patenting Life Forms*, 322 NATURE 785, 787 (August 1986).

> The fact that eligibility for protection under the PVPA requires no demonstration of economic utility over existing varieties means that this fine-tuning can be used to create "pseudo-varieties." . . . [P]rivate breeding work may involve a substantial amount of unproductive effort to achieve uniqueness, and thus protectability, through transfer of non-economic traits such as flower color.

Jack R. Kloppenburg, Jr., FIRST THE SEED: THE POLITICAL ECONOMY OF PLANT BIOTECHNOLOGY, 1492-2000 144 (1988). Not only can economically insignificant

traits like flower color serve as the basis for novelty, but even unique *disutility* can form the basis of PVPA certification—one PVPA certificate was awarded to a company for developing a new variety of soybean whose "novel and distinguishing feature" was that it was *susceptible* to a certain plant disease! Jack Doyle, ALTERED HARVEST: AGRICULTURE, GENETICS, AND THE FATE OF THE WORLD'S FOOD SUPPLY 320 (1985).[18]

With respect to "uniformity" and "stability," the PVPA Office must rely upon the representations of the applicant. In practice, however, the phenomenon of "genetic drift"—the loss of genetic characteristics in each successive generation—causes substantial variations in sexually produced plants within a few generations. The USDA originally opposed granting patent protection to sexually reproducing plants in part because of such concerns. Cary Fowler, UNNATURAL SELECTION: TECHNOLOGY, POLITICS AND PLANT EVOLUTION 112 (forthcoming 1994). Indeed, the Winterboers are confident that, if necessary, at trial they could establish that the seeds for which Asgrow claims protection, A1937 and A2234, are significantly different from the seeds for which certifications were granted.

Because of genetic drift, farmers typically have to buy new seeds from the certificate holder after two or three years in order for the quality to correspond with that of the parents. Genetic drift has largely prevented the farmer's exemption from undermining the economic incentives underlying the PVPA's promotion of research. Robert P. Merges, *Intellectual Property in Higher Life Forms: The*

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[18] Given the PVPA's encouragement of product differentiation through the creation and sale of proprietary varieties, the suggestion that the increase in the number of varieties after passage of the PVPA measures agronomic progress, *see, e.g.*, ASTA Amicus Br. at 10, "is tantamount to measuring a temperature first with a Celsius thermometer, then with a Fahrenheit thermometer, and concluding that the temperature has approximately doubled." Berland and Lewontin, *supra* p. 38.

Patent System and Controversial Technologies, 47 MD. L. REV. 1051, 1071 (1988); W. Lesser, *Modifications in Intellectual Property Rights Law and Effects on Agricultural Research, in* U.S. AGRICULTURAL RESEARCH: STRATEGIC CHALLENGES AND OPTIONS (Robert D. Weaver ed. 1993).

As the only statute in American Law that provides intellectual property rights to self-reproducing subject matter, the PVPA "was drafted with a sensitivity to the practical problems of farmers who have to cope with intellectual property rights over their primary source of livelihood." Merges, *supra*, 47 MD. L. REV. at 1070. As pointed out above, the House of Representatives, in considering the Transgenic Animal Patent Reform Act, noted some of the benefits of a farmer's exemption, including that it reduces burdensome recordkeeping for farmers, avoids difficult enforcement requirements, reduces uncertainty, and has little detrimental impact on incentives to research because of genetic drift. H.R. Rep. No. 888 at 73, *supra* p. 36.

The limited showing and practical problems of reproducing stable and uniform sexually reproduced plants support a limitation on the breeders rights afforded by Congress. The introduction of a new variety does not entail the complex efforts associated with biotechnology or the development of hybrids and mutants. Breeders of new life forms developed through biotechnology may receive utility patents under this Court's decision in *Diamond v. Chakrabarty*, 447 U.S. 303 (1980), and developers of new and distinct asexual plants may receive protection under the Plant Patent Act, 35 U.S.C. § 161, *et seq.* In contrast, the process of introducing new varieties under the PVPA is one of selection and cross breeding—activities that have been carried out by farmers since the beginning of agriculture.

In sum, even if this Court's role was to rewrite legislation to conform to the public interest, the farmer's exemption as currently generally understood represents a socially, economically and politically appropriate limitation on the seed industry's monopoly control over plant genetic resources, and should not be disturbed.

III. THE NOTICE REQUIREMENT OF SECTION 2541(6) DOES NOT APPLY TO SAVED SEED.

The Federal Circuit correctly held that the notice requirement of 7 U.S.C. § 2541(6) did not apply to saved seed. Pet. App. 13a. The Solicitor General concurs with this view as well. Sol. Gen. Br. at 22-27.

The language of the statute is clear. Section 2541(6) provides, in relevant part, that—

> *Except as otherwise provided in this subchapter*, it shall be an infringement of the rights of the owner of a novel variety to perform without authority any of the following acts . . . :
>
> . . . .
>
> (6) dispense the novel variety to another, in a form which can be propagated, without notice as to being a protected variety under which it was received[.]

7 U.S.C. § 2541(6) (emphasis added).

The operative element of this language is the introductory phrase, "[e]xcept as otherwise provided in this subchapter . . . ." Section 2543 is the provision within the subchapter that clearly provides otherwise. It provides, in relevant part, that—

> without regard to the provisions of section 2541(3) of this title it shall not infringe any right hereunder for a person, whose primary farming occupation is the growing of crops for sale for other than reproductive purposes, to sell such saved seed to other persons so engaged, for reproductive purposes, provided such sale is in compliance with such State laws governing the sale of seed as may be applicable.

7 U.S.C. § 2543.

Section 2543 thus unambiguously provides that it is not an infringement for a farmer to sell saved seed for reproductive purposes to another farmer in accordance with applicable state law. Putting aside for the moment the dispute as to how much saved seed can be sold, and who may be considered a farmer, it is beyond argument that Section 2543 allows *some* saved seed to be sold in *some* circumstances. Thus, it is equally beyond argument that, when such saved seed is sold—or, in the words of Section 2541(6), "dispensed . . . to another, in a form which can be propagated"—it need not contain the notice otherwise required by Section 2541(6). Otherwise, the introductory phrase, "except as otherwise provided in this subchapter," would have no meaning.

Asgrow's argument that the first sentence of Section 2543 authorizes only the sale of saved seed, and that Section 2541(6) does not relate to sales, but only to giving of notice, rests on either a fundamentally misguided attempt to distinguish between the act of sale and the giving of notice, or a similarly weak attempt to distinguish between "selling" saved seed and "dispensing" it. But Subsection (6) of Section 2541 makes the notice requirement entirely dependent on "dispens[ing]" the seed. And, clearly, selling seed is one way of dispensing it. Thus, Asgrow's argument finds no support in the language or structure of the statute.

Nor do Asgrow's policy arguments fare any better. Its argument that requiring notice even on such "brown bag" sales is consistent with the statute's purpose that a purchaser have actual notice before being subject to an infringement suit, Pet. Br. at 39, is undercut by the fact that the statute does not in fact require actual notice as a prerequisite for liability for infringement, except in the narrow circumstance where the distribution is authorized by the owner of the novel variety. Section 2567 requires proof of actual notice only where seed is distributed "by authorization of the owner and is received by the infringer without" labeling or marking. But Section 2567 says nothing about any such requirement where distribution is made *without* the authorization of the owner, indicating that Congress did not intend actual notice to be a prerequisite to liability in that circumstance.

For these reasons, the Court should hold, in accordance with the court of appeals below and with the argument of amicus curiae the Solicitor General here, that any sale of saved seed allowed by the statute is exempt from the notice requirement of Section 2541(6).

CONCLUSION

The Court should affirm the decision of the Federal Circuit preserving the farmer's exemption to the Plant Variety Protection Act. Asgrow's invitation to rewrite the farmer's exemption and to limit sales in the case of soybeans to 1/45th of a farmer's crop in order to further Asgrow's ideas of the purposes of the PVPA should be expressly rejected. The compromise Congress struck in the PVPA carefully balances breeders' rights against the centuries-old right of farmers to save and sell seed grown on their farms to other farmers. The Court's restraint against rewriting legislation is particularly appropriate considering that Congress, in reaction to lobbying by various pharmaceutical and chemical companies dissatisfied with this compromise, is now considering amendments to the farmer's exemption.

Respectfully submitted,

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